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In The

Supreme Court of the United States

October Term, 1992

NANCY JOHNSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), the court of appeals correctly held that the provisions for review of individual Railroad Retirement Act claims in the federal appellate courts foreclose district court jurisdiction over a generic challenge to a statutory interpretation by the Railroad Retirement Board.

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No. _____

In The

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NANCY JOHNSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Nancy Johnson, on behalf of herself and all others similarly situated, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. la-38a) is reported at 969 F.2d 1082. The orders of the district court (App. 40a-42a, 43a-44a) are not reported. The order of the

court of appeals denying the petition for rehearing (App. 39a) is unreported.

JURISDICTION

The judgment and opinion of the court of appeals were entered on July 10, 1992, and the petition for rehearing was denied on September 11, 1992. On December 1, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 31, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1) Section 231g of Title 45 states as follows:

Court jurisdiction

> Decisions of the Board determining the rights or liabilities of any person under this subchapter shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a determination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act [45 U.S.C.A. § 351 et seq.] except that the time within which proceedings for the review of a decision with respect to an annuity, supplemental annuity, or lumpsum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

2) Sections 355(f) and (g) of Title 45 state as follows:

(f) Review of final decision of Board by Courts of Appeals; costs

Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act [45 U.S.C.A. § 151 et seq.], of which claimant is a member or any base-year employer of the claimant, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. A copy of such petition also shall forthwith be served upon any other properly interested party, and such party shall be a party to the review proceeding. Service may be made upon the Board by registered mail addressed to the Chairman. Within thirty days after receipt of service, or within such additional time as the court may allow, the Board shall file with the court in which such petition

has been filed the record upon which the findings and decision complained of are based, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein. It shall have power to enter a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

(g) Finality of Board decisions

Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this

section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or accounting officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

STATEMENT

This case involves the jurisdiction of the district courts over the Railroad Retirement Board when statutory or constitutional challenges are brought to the Board's policies, practices, or interpretations. While there is no dispute that individual claims for annuities must be reviewed directly in the courts of appeals, see 45 U.S.C. § 355(f), incorporated by *id.*, § 231g, district court review of "pattern and practice" cases should not be foreclosed by subsection 355(f). The importance of that review is underscored by the fact that, in its absence, the Board is insulated from class action challenges and thereby remains free to carry out its discredited policies with no regard for the contrary determinations by the circuit courts.

Although the court of appeals below was fully cognizant of the Board's manipulation of the review scheme as a means of avoiding effective judicial intervention, it

applied a narrow and skewed reading of *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888 (1991), and of its circuit's application of *McNary* in *Ayuda, Inc. v. Thornburgh*, 948 F.2d 742 (D.C.Cir. 1991), pet. for cert. pending, No. 91-1924, to conclude that district court jurisdiction was foreclosed. It did so even though two other appellate courts had explicitly upheld district court jurisdiction over the Board and numerous courts, including this Court, had implicitly acknowledged that jurisdiction. In light of these deviations from prior decisions of this Court and other appellate courts, and especially given the pendency before the Court of a case raising similar questions about the application of *McNary*, *Barr v. Catholic Social Services, Inc.*, No. 91-1826, the Court should either grant the petition or defer consideration until it decides the latter case.

1.a. The Railroad Retirement Act (the Act) provides benefits and annuities to retired railroaders, their families, and survivors. See 45 U.S.C. § 231a *et seq.* Among the annuities available are those for the spouses of retired or deceased railroaders who are caring for the railroaders' children. The Act authorizes annuities for these spouses until the children reach the age of 18, but, beginning in 1981, the Board began to terminate the annuities of these so-called "caretaker spouses" when the children reached the age of 16.

In 1985, the Eighth Circuit, ruling on an individual petition for review, rejected the Board's interpretation, concluding that the "plain language of the Railroad Retirement Act entitles [the claimant] to a widow's annuity . . . , and there is nothing in the purpose or history of the Act to gainsay this clear intent. . . . " *Costello v. United*

States R.R. Retirement Board, 780 F.2d 1352, 1356 (8th Cir. 1985).

In response to this decision, the Board purported to reinterpret the statutory provisions so that the smaller portion of the annuity ("Tier II") would be paid to the caretaker spouse until the child reached age 18. See *Johnson v. United States R.R. Retirement Board*, 925 F.2d 1374, 1377 (11th Cir. 1991). The Board otherwise ignored the *Costello* decision (except for the individual claimant herself, who was paid both Tier I and Tier II). Indeed, even for residents of the Eighth Circuit, the Board refused to follow *Costello* unless a claimant took her case to the conclusion of the administrative process, a policy which one of the three Board Members termed " 'grossly unjust.' " App. 20a.

On another petition for review, the Eleventh Circuit agreed with the Eighth Circuit that the Board's construction of the Act was in error and ordered payment of the full annuity (*i.e.*, both Tiers I and II) until the child reached age 18. *Johnson*, 925 F.2d at 1379. As with *Costello*, the Board honored this decision only for the individual claimant.

b. The Railroad Retirement Act, like the Social Security Act, has a four-step administrative process for claims for benefits. 20 C.F.R., part 260; see, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 471-472 (1986). Unlike under the Social Security Act, however, the standard procedure for review of adverse decisions by the Board is by filing a petition for review in one of three circuit courts, the Seventh Circuit, the District of Columbia Circuit, or the

circuit where the claimant resides. 45 U.S.C. § 355(f), incorporated by *id.*, § 231g; see App. 6a.

2. After she was notified by the Board that the Tier I component of her annuity would be terminated when the youngest child reached the age of 16, thus reducing her monthly payment from $391.11 to $84.11, Nancy Johnson dutifully proceeded through the Board's administrative maze. Two and one-half years after beginning that process, she received a final adverse decision from the Board, with one Member dissenting. See App. 3a-4a.

She then filed an in forma pauperis complaint in the district court on September 21, 1989, alleging jurisdiction under 28 U.S.C. §§ 1331, 1337, and 1361, requesting certification of a nationwide class of caretaker spouses whose annuities had been terminated or reduced when the youngest child turned age 16, and seeking declaratory and injunctive relief against the Board's continued effectuation of this policy. See App. 4a. She moved for class certification, but the Board moved to dismiss the complaint for lack of subject matter jurisdiction.

On July 12, 1990, the district court agreed with the Board that it lacked subject matter jurisdiction and ordered the case transferred to the court of appeals pursuant to 28 U.S.C. § 1631. App. 40a-42a. The district court did not rule on the motion for class certification. Mrs. Johnson moved for reconsideration of the transfer order in order to protect the rights of the class members (see App. 4a-5a), and the district court granted the motion and dismissed the complaint outright. App. 43a-44a. Mrs. Johnson then appealed the jurisdictional holding. App. 5a.

3. Mrs. Johnson had filed a protective petition for review in the court of appeals on her individual claim on May 9, 1990. The court of appeals consolidated the appeal and the petition for review for purposes of briefing and oral argument. On July 10, 1992, it issued its decision.

a. With one judge dissenting, the panel agreed with the Eighth and Eleventh Circuits that the Board had misconstrued the Railroad Retirement Act by terminating the Tier I component of Mrs. Johnson's annuity when the youngest child turned 16. App. 12a-20a. On this resolution of the petition for review, the Board neither sought rehearing or rehearing *en banc*, nor did it request review from this Court. Thus, for the third time on this issue, the Board has declined to challenge an adverse appellate decision while refusing to correct the repudiated policy.[1]

b. In affirming dismissal of the complaint, the court of appeals concluded that the provision authorizing direct review by the appellate courts on individual claims was sufficiently broad to foreclose district court review of generic challenges to the Board's policies and interpretations. Although it discussed this Court's recent decision

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[1] According to documents provided in response to a Freedom of Information Act request, the Board has applied the decision below in full only to those annuitants whose youngest child turned 16 on or after August 1, 1992. Those whose Tier I components were terminated prior to August 1, 1992 will have them restored only if they have an administrative claim pending on that date, and the restoration will be effective only from August 1, 1992. The Board estimates that between 5400 and 8700 spouses and survivors whose Tier I portions were eliminated pursuant to the invalid policy will receive no relief at all.

in *McNary* and recognized that the Immigration Act provision there at issue had "a similarly worded section" to that in this case, the court below held that the language in the instant scheme precluded district court jurisdiction. App. 7a. Then, proceeding to the second step of a two-part analysis which it claimed to derive from *McNary*, the court concluded that the review scheme was not sufficiently "inadequate" to warrant an exception. App. 9a-10a.

The court of appeals also relied on *Ayuda*, which is its circuit's interpretation of *McNary* and by which the panel below felt bound. It viewed the holding in *Ayuda*, that district court jurisdiction was foreclosed by that review scheme, as turning on the adequacy of the administrative record, which distinguished it from the situation in *McNary*. Since the court below felt that there was no claim that the administrative record in this case was inadequate, the *Ayuda* result, rather than that in *McNary*, was the appropriate conclusion. App. 10a-11a.

The panel rejected Mrs. Johnson's contention that, because of the Board's complementary practice of not acquiescing in appellate decisions while declining to seek Supreme Court review, the review mechanism for individual claims in the courts of appeals foreclosed meaningful judicial review. App. 12a. Despite a strongly worded attack on the Board's persistent refusal to apply circuit decisions beyond the individual claimants, in which the court repudiated the Board's "asserti[on of] a right of nonacquiescence in its most sweeping sense," (App. 23a), it did not recognize the ineffectiveness of the direct review provision for enforcing judicial mandates and thus declined to embrace district court jurisdiction

over the Board. Rather, it merely suggested that other caretaker spouses could bring direct challenges in the Court of Appeals for the District of Columbia Circuit to "the policy of nonacquiescence itself [which] could be considered a 'final decision of the Board' under 45 U.S.C. § 355(f). . . . " App. 28a.

REASONS FOR GRANTING THE PETITION

1. The decision below reverses the presumption established and reiterated by this Court that, unless Congress clearly states an intent to preclude judicial review of administrative action, review should be available. In *McNary*, 111 S.Ct. at 892, this Court stated that, "given the absence of clear congressional language mandating preclusion of federal jurisdiction and the nature of [plaintiffs'] requested relief," the district courts may exercise jurisdiction over constitutional and statutory challenges to agency practices in order to ensure meaningful judicial review. Emphasizing this point, the Court also observed:

> [G]iven our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, see *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 . . . (1986), coupled with the limited review provisions [at issue], it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.

McNary, 111 S.Ct. at 898.

The court below, however, ignored this Court's directive that preclusion language must be clear in order to

overcome the presumption in favor of judicial review. Instead, it created a presumption against district court review by concluding that the review scheme in the Railroad Retirement Act "governs Mrs. Johnson's claim" and then searching to determine "whether an exception is justified. . . . " App. 9a. This Court, however, did not suggest that its holding in *McNary* was dependent on there being *no* alternative review, but, rather, that the statutory review scheme must occasion "the *practical equivalent* of a total denial of judicial review of generic constitutional and statutory claims." 111 S.Ct. at 899 (emphasis added). Ironically, the court below detailed at length how the review scheme was manipulated by the Board to prevent review of generic statutory claims, yet the court's reversal of the presumption in favor of review led it to ignore that reality and to a conclusion contrary to that in *McNary*.

In addition, the court below papered over the split between the Seventh and Eighth Circuits on jurisdiction over the Board, ignored the decision of the Second Circuit upholding district court jurisdiction over the Board, and failed to recognize that several courts, including this Court, have implicitly recognized district court jurisdiction over the Board in a number of cases.

The result is considerable confusion on several levels. In general, the decision perpetuates inter-circuit differences in the interpretation of *McNary*; on a more specific level, the court below has exacerbated the inconsistency regarding district court jurisdiction over the Board. The issue has considerable practical significance because,

under the decision of the court below, the Railroad Retirement Board, alone among federal agencies which dispense benefits to the citizenry, is insulated from class action challenges, which are the only effective and efficient means of forcing compliance with statutory mandates.

Review is thus warranted to resolve these discrepancies and to ensure that the Board does not remain free of "interference" from the courts in its statutory interpretations. At the very least, the Court should defer consideration of this petition until it has ruled in *Catholic Social Services*, in which it may provide additional guidance regarding its *McNary* analysis.

2. In *McNary*, 111 S.Ct. at 895, the Court relied on several considerations to determine whether another provision for direct review in the courts of appeals "also forecloses this general challenge to the INS's unconstitutional practices." It pointed first and foremost to the statutory language, which referred to "a single act rather than a group of decisions or a practice or procedure employed in making decisions." *Id.* at 896. It noted also that, if Congress had intended these review provisions to apply to "procedures and practices, it could easily have used broader statutory language." *Id.* at 897.

The Court further supported its conclusion that district court review of agency policies was not precluded because the claimants were not seeking a substantive declaration of eligibility. Rather, they sought only a reconsideration of their claims under the corrected policy. *Id.* at 898.

Finally, the Court determined that the claimants would otherwise be denied "meaningful judicial review". In support of this conclusion, the Court cited three factors relevant to the particular scheme: the standard review mechanism did not permit claimants to compile a sufficient administrative record; review could only be obtained if claimants voluntarily surrendered themselves for deportation; and

> [n]ot only would a court of appeals reviewing an individual . . . determination . . . most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court.

Ibid.

The court below, however, strayed significantly from this commonsense distinction between provisions designed for individual review in the courts of appeals and generic challenges to an agency's policies and practices. It ignored or distorted this Court's analysis, beginning with its determination to treat the inquiry as a loaded two-part question. See App. 6a.

The court of appeals had to concede that the review provision in the Railroad Retirement Act, with its individual references, was "similarly worded" to the provision considered in *McNary*. App. 7a. As in that decision, the language here at issue describes "the process of direct review of individual denials . . . , rather than . . . referring to general collateral challenges to . . . practices and policies used by the agency in processing applications." 111 S.Ct. at 896.

In an effort to construct a distinction between the situations, however, the court below betrayed considerable confusion. While purporting to refer to the review provision in 45 U.S.C. § 355(f), in fact it quoted from the language in subsection 355(g). See App. 7a. This mistake is significant because subsection 355(g) corresponds to the first two sentences of 42 U.S.C. § 405(h) in the Social Security Act, which is not a review provision, but a requirement of administrative exhaustion. *Michigan Academy*, 476 U.S. at 679 n. 8, citing *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975). Indeed, the last sentence of subsection 355(g) itself confirms that subsection 355(f) is the review provision, as it states that Board decisions "shall not be subject to review in any manner other than that set forth in subsection (f) of this section." Thus, the language on which the court below placed such great reliance – "the determination of any other matter" – is not even part of the review statute.

Secondly, even if that language is considered relevant to the question of district court jurisdiction, the court failed to recognize that the referenced language was unrelated to claims under the Railroad *Retirement* Act. In relevant part, subsection 355(g) refers to the "determination of any claim for benefits or refund [and] *the determination of any other matter* pursuant to subsection (c) of this section. . . . " (Emphasis added.) The italicized portion, on which the court below relied, is directed at matters arising under the Railroad *Unemployment Insurance* Act, of which subsection 355(g) is a part. That subsection is generally incorporated into the Railroad Retirement Act by 45 U.S.C. § 231g, but the incorporation is only logically applicable for those portions of section

355 which have relevance to the kinds of issues arising under the Railroad Retirement Act. Only the first mention of a "determination" in subsection 355(g) – "the determination of any claim for benefits" – has that relevance. The allegedly broader determination language on which the court depended for its conclusion is not related to the Railroad Retirement Act review scheme.[2]

Thirdly, the court below offered no explanation as to why the other minor textual differences from the provision in *McNary* (App. 7a) should dictate a different result than in that case. It merely quoted them for the conclusory proposition that "the Railroad Act contains a broader preclusion of district court jurisdiction than the [provision in *McNary*] does." These traditional phrasings, however, certainly do not represent the " 'showing of "clear and convincing evidence" of a contrary legislative intent' " for the courts to restrict access to judicial review. *Michigan Academy*, 476 U.S. at 671 (citation omitted).[3]

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[2] The court below neglected to note that the full reference to "the determination of any other matter" cites specifically to 45 U.S.C. § 355(c). Subsection 355(c) of the Railroad Unemployment Insurance Act refers to a number of issues and entities which have no relevance to annuitants and their benefits under the Railroad Retirement Act. The "determination of any other matter" is thus not intended to suggest that all possible claims against the Board must be brought through the mechanism of section 355, but simply reflects the fact that subsection (c) contemplates issues other than "the determination of any claim for benefits or refund. . . . "

[3] For instance, the court below inferred an intention at preclusion in the phrase "any final decision" in 45 U.S.C. § 355(f). App. 7a. The same expression, however, appears in the Social Security Act review provision, 42 U.S.C. § 405(g), yet that

Having discerned these alleged differences from the language in *McNary*, however, the court below then embarked upon the second part of its analysis, to determine "whether an exception is justified because the review offered is 'inadequate' or less than 'meaningful'. . . . " App. 9a. Aside from employing an approach which deviated from the presumption in favor of review so strongly embraced and applied in *McNary*, this methodology also ignored two factors cited by this Court which favored review in that case and equally favor it here. First, the claimants in both district court actions were not seeking substantive declarations of entitlement, but, rather, correction of the agency's policy and reconsideration of their claims in light of the corrected policy. See *McNary*, 111 S.Ct. at 898.

Secondly, Congress knows how to employ broad preclusionary language when it intends to limit review, and nothing in the language relied on by the court below describes such an explicit attempt to restrict review to the scheme set out in 45 U.S.C. § 355(f). This point takes on particular significance when compared to the generally similar Social Security Act scheme, which is strikingly distinguished by the presence of a provision employing explicit and unambiguous language on preclusion.[4]

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language has never been accorded any exclusionary significance.

[4] As noted, *supra*, at 15, the Social Security Act analog to 45 U.S.C. § 355(g) is 42 U.S.C. § 405(h). The last sentence of the latter explicitly forecloses district court jurisdiction over Social Security Act claims under 28 U.S.C. § 1331, *Salfi*, 422 U.S. at 756-762, but, despite the other similarities between the provisions, there is no preclusion language in subsection 355(g). See

In determining that there should be no exception to its presumption that the statutory review scheme must be construed to foreclose district court review, the court cited factors discussed in *McNary* and *Ayuda*. With no explanation, however, it ignored that at least two of those factors support Mrs. Johnson's position: the appellate process is unsuited to developing a relevant record and district court jurisdiction is necessary in order to produce discovery regarding, *inter alia*, the development of the Board's substantive policy, the scope and chronology of its practice of nonacquiescence, its compliance or lack thereof with the Administrative Procedure Act, and the number of class members affected. None of this information, which is critical to the development and outcome of the litigation, was available through the scheme of direct review in the appellate process. See *McNary*, 111 S.Ct. at 899 (quoting from the Brief of American Bar Association as *Amicus Curiae*, filed in that case); *Denberg*, 696 F.2d at 1202 (Wood, J., dissenting); *Linquist v. Bowen*, 633 F.Supp. 846, 856 (W.D.Mo. 1986), aff'd, 813 F.2d 884 (8th Cir. 1987).

The court below then proceeded to find the statutory review scheme to be meaningful because there is no "heavy penalty" such as that in *McNary*. Nothing in *McNary*, however, suggests that a precondition for finding review not to be meaningful is that the scheme exact a

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Denberg v. United States R.R. Retirement Board, 696 F.2d 1193, 1202 n.3 (7th Cir. 1983) (Wood, J., dissenting), cert. denied, 466 U.S. 926 (1984); Brief for American Bar Association as *Amicus Curiae*, at 10-11 n.5, in *Barr v. Catholic Social Services*, No. 91-1826.

"heavy penalty" on individual claimants. It is the practical inability to obtain review which defines review as not meaningful, not the particular cause of that event. Here, as the court below detailed, the inability to bring class action challenges in the appellate courts,[5] when combined with the Board's policies of nonaquiescing in circuit court decisions and refusing to seek Supreme Court review, has the effect of depriving Railroad Retirement Act claimants of the ability to challenge the Board's actions. The Board's methodology for preventing effective review is no less compelling a policy consideration than the penalty imposed on claimants seeking review in the *McNary* context.

One of the striking ironies of the decision below is its failure to recognize that even the *Ayuda* majority, which established the D.C. Circuit's narrow reading of *McNary*, would probably have reached a different result in this case. Although that panel found district court jurisdiction to be foreclosed, it expressly recognized that, if the defendant INS had engaged in the kind of manipulative behavior which is designed to "frustrate judicial review," there would have been a different result: "[W]e have not seen a shred of evidence that the INS has ever considered such a despicable course, but even if it were to occur, we think that the *McNary* exception would again apply . . . [to allow suit] directly in district court." *Ayuda*, 948 F.2d at 751 (footnote omitted). The instant situation depicts precisely that kind of agency misconduct, and thus should

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[5] *Burns v. United States R.R. Retirement Board*, 701 F.2d 189 (D.C.Cir. 1983); *Gebbie v. United States R.R. Retirement Board*, 631 F.2d 512, 516 n.9 (7th Cir. 1980).

have triggered the result which was only hypothetical in *Ayuda*.

3. In its determination to apply restrictive interpretations of *McNary* and *Ayuda*, the court below had to recognize the admitted split in the circuits. See App. 5a. First, it noted that the *Ayuda* court had reached a different result than had the Ninth and Seventh Circuits in *Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914, 920-921 (9th Cir.), cert. granted *sub nom. Barr v. Catholic Social Services. Inc.*, 112 S.Ct. 2990 (1992), and *Morales v. Yeutter*, 952 F.2d 954, 957 (7th Cir. 1991). See App. 11a. To the extent, therefore, that the decision below relied on the analysis in *Ayuda*, it perpetuates the conflict between the circuits as to the correct application of *McNary*.

Secondly, the court of appeals' decision exacerbates the ongoing dispute between the circuits on the precise issue of this petition: whether the district courts have jurisdiction over the Railroad Retirement Board in generic challenges to policies and practices. In considering this issue, the court simply ignored the Second Circuit's determination that the district courts, in appropriate circumstances, could exercise jurisdiction over the Board. See *Finnerty v. Cowen*, 508 F.2d 979, 984 (2d Cir. 1974). The Second Circuit expressly repudiated the appellate review scheme as foreclosing district court jurisdiction, but the court below did not even attempt to distinguish that decision.[6]

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[6] The court did try to reconcile the majority opinion in *Denberg* with *Linquist*, in which the courts reached opposite conclusions about district court jurisdiction over the Board. It determined that direct review in the court of appeals was ade-

Moreover, the decision below also ignored the fact that district and appellate courts, including this Court, have regularly assumed that district courts had jurisdiction over the Board in challenges to its policies and practices.[7] Whatever the significance as precedential value of decisions which implicitly recognize jurisdiction, the fact remains that, in a number of cases raising challenges to Board policies and interpretations, district courts have consistently exercised jurisdiction over the Board in situations indistinguishable from the instant one. Accordingly, there are considerable discrepancies and confusion among the circuits as to when Board policies and practices may be challenged in the district courts.

The matter is rendered the more important because of the significance now attached to class action litigation against federal agencies which administer benefit programs, such as the Social Security Administration. This Court fully delineated the compelling reasons for such

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quate in the former but not in the latter (App. 9a), yet, as with its analysis of this case, the court below never confronted the practical impact occasioned by the inability to obtain class certification in *Denberg*. The fact that the Eighth Circuit recognized the need for district court jurisdiction in order to have both defendants in one forum, see *Linquist*, 813 F.2d at 888, does not suggest that inadequacy may not inhere for other reasons.

[7] *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166 (1980); *Yost v. Schweiker*, 545 F.Supp. 591 (D.S.D. 1982), aff'd, 699 F.2d 438 (8th Cir. 1983); *Pope v. Railroad Retirement Board*, 672 F.2d 972 (D.C.Cir. 1982); *Lewis v. Cowen*, 417 F.Supp. 1047 (E.D.Pa. 1976), vac'd and remanded, 547 F.2d 1162 (3d Cir.) (table), on remand, 443 F.Supp. 544 (E.D.Pa. 1977) (3-judge court), sum. aff'd, 435 U.S. 948 (1978).

actions in *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979); see also Brief for American Bar Association as *Amicus Curiae*, at 18-19, in *Barr v. Catholic Social Services*, No. 91-1826, and the need for the intended beneficiaries of these programs to possess this enforcement capability has been recognized over and over again in the federal courts. See, *e.g.*, *Bowen v. City of New York*, 476 U.S. 467 (1986) (agency's secret policy of denying disability benefits only corrected through a class action).

As the deplorable sequence of events involving the substantive issue of this case demonstrates, however, the Railroad Retirement Board, in the absence of district court jurisdiction and therefore class certification, remains insulated from the kind of judicial "interference" which has been so critical in providing relief from illegal Social Security Administration policies. No policy or principled rationale presents itself as to why the Board, apparently alone among federal agencies distributing benefits, should be so protected. Nor does the language of the provision for individual review offer any clear indication that Congress intended such a peculiar result.

4. The Court should grant the petition and set it for plenary review in order to eliminate the confusion among the circuits and to resolve, once and for all, the important question of whether Congress extended to the Board a nearly unfettered discretion to carry out its legislative mandate.

In the alternative, the Court may wish to withhold resolution of this petition until it has decided *Catholic Social Services*. At that time, the Court should grant the

petition, either setting the case for full briefing and argument, or vacating the decision below and remanding for further consideration in light of the decision in *Catholic Social Services*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
TOBY S. EDELMAN
KELLY A. MILLER
RONALD MARSTIN

December 1992

APPENDIX A

Nancy JOHNSON, Petitioner-Appellant,

v.

UNITED STATES RAILROAD RETIREMENT BOARD,
Respondent-Appellee.
Nos. 90-1243, 90-5380.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 23, 1991.

Decided July 10, 1992.

Petition to Review Decision of the United States Railroad Retirement Board, and Appeal from the United States District Court for the District of Columbia, Charles R. Richey, J.

Gill Deford, with whom Neal S. Dudovitz, Los Angeles, Cal., and Toby S. Edelman, Washington, D.C., were on the brief, for petitioner.

Karl T. Blank, Gen. Atty., R.R. Retirement Bd., Chicago, Ill., and Susan A. Nellor, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., John D. Bates and R. Craig Lawrence, Asst. U.S. Attys., Washington, D.C., Steven A. Bartholow, Deputy Gen. Counsel, and Edward S. Hintzke, Asst. Gen. Counsel, R.R. Retirement Bd., Chicago, Ill., were on the brief, for respondent.

Before MIKVA, Chief Judge, WALD and BUCKLEY, Circuit Judges.

Opinion for the Court filed by Chief Judge MIKVA.

Opinion concurring in part and dissenting in part filed by Circuit Judge BUCKLEY.

MIKVA, Chief Judge:

In a bold challenge to judicial authority, the United States Railroad Retirement Board argues that it is free, when it chooses, to ignore the decisions of United States courts of appeals. Since 1981, the Board has cut off benefits for the spouses and widows of railroad workers after their dependent children turn sixteen, even though the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v (1988), says that they are entitled to benefits until the children turn eighteen. In 1985, the Court of Appeals for the Eighth Circuit rejected the Board's position that an amendment to the Social Security Act required the change. *Costello v. United States R.R. Retirement Bd.*, 780 F.2d 1352 (8th Cir.1985). The Board, however, refused to apply the *Costello* decision, even within the Eighth Circuit, and continued to deny benefits at the administrative level. In March 1991, the Court of Appeals for the Eleventh Circuit rejected the Board's position for the same reasons as the Eighth Circuit. *Johnson v. United States R.R. Retirement Bd.*, 925 F.2d 1374 (11th Cir.1991). The Board still refuses to acquiesce. Since individual challenges have been ineffective, Nancy Johnson, whose spousal benefits were denied, tried to bring a class action in district court challenging the Board's interpretation of the Railroad Act and its policy of intracircuit nonacquiescence.

Because we think that Mrs. Johnson has not been denied "meaningful" access to judicial review, we uphold the district court's conclusion that the Railroad Act vests

exclusive jurisdiction in the courts of appeals. But we join the Eighth and Eleventh Circuits and reject the Board's interpretation of the Railroad Act for the third time. We also think that the Board's unapologetic policy of nonacquiescence is inconsistent with the Board's own jurisdictional arguments and troubling on statutory and constitutional grounds. If the Board continues to deny benefits after our decision today, we expect that the policy itself can be directly challenged in an appropriate action before this court.

I. Background

Nancy Johnson is the wife of Edward Johnson, a former railroad employee. As the mother and stepmother of his five children, the Board found her eligible for a spousal annuity effective September 10, 1976. In late 1986, the Board notified her that the Tier I component of her annuity would be cut off on April 1, 1987, when her youngest child turned sixteen. (The Railroad Act divides the benefit into two tiers, with separate eligibility criteria). On reconsideration, Mrs. Johnson's claim was denied, and her monthly payment was reduced from $391.11 to $84.11. She filed an administrative appeal, and was told that the issue presented "was solely a matter of law," and did not require a hearing. The first appeals referee denied Mrs. Johnson's claim, and came to the remarkable conclusion that the *Costello* case requires her benefits to be terminated, even though the case explicitly requires the opposite result. Railroad Bd. No. 90-1243 (Sept. 29, 1987). A second appeals referee reopened the decision and again rejected her argument, noting that

"*Costello* was not a class action case and the Board did not pursue it further." *Id.* (July 12, 1988). Mrs. Johnson appealed again, and on May 16, 1989, a three-member panel of the Board issued its final decision, affirming the decision of the second appeals referee in a one-sentence order. The third panel member dissented vigorously, calling the Board's policy of nonacquiescence "grossly unjust" and urging payment of Tier I benefits to all widows and spouses with children between sixteen and eighteen. *Id.* (May 16, 1989) (Chamberlain, C.J., dissenting).

Having exhausted her administrative remedies, Mrs. Johnson filed a class action in district court, suing individually and on behalf of similarly situated beneficiaries under the Act. She claimed that the Board's denial of full benefits to those in her circumstances violated the Act and the Fifth Amendment's Due Process clause. She also claimed that the Board's policy of intracircuit nonacquiescence violated the statutory and constitutional rights of her class.

The district court decided that the Railroad Act gives the federal courts of appeals exclusive jurisdiction to review the Board's decisions. Concluding, accordingly, that it lacked subject matter jurisdiction over Mrs. Johnson's complaint, it transferred her case to this court pursuant to 28 U.S.C. § 1631 on July 12, 1990. This presented Mrs. Johnson with a dilemma: although an appeals court can adjudicate her individual claim, it cannot adjudicate the class action; and if she chose to pursue the transfer, she would have to abandon the class action challenge. She chose instead to move for reconsideration, requesting that the district court dismiss her complaint, or that it

certify its order finding no jurisdiction for interlocutory review under 28 U.S.C. § 129(b). While her complaint was pending in the district court, Mrs. Johnson petitioned this court for review, to protect her individual claim for benefits. The district court, in turn, granted reconsideration, vacated the transfer, and on October 4, 1990, dismissed Johnson's case for lack of jurisdiction.

This appeal followed.

II. Analysis

A. *District Court Jurisdiction*

Two circuits are split about whether district courts have subject matter jurisdiction to entertain class action suits raising purely legal challenges to the Board's determination of benefits under the Railroad Act. *Compare Linquist v. Bowen*, 813 F.2d 884, 888 (8th Cir.1987) (district court properly exercised mandamus jurisdiction under 28 U.S.C. § 1361 to entertain class action on behalf of dual beneficiaries under Social Security Act and Railroad Retirement Act) *with Denberg v. United States R.R. Retirement Bd.*, 696 F.2d 1193, 1197-98 (7th Cir.1983), *cert. denied*, 466 U.S. 926, 104 S.Ct. 1706, 80 L.Ed.2d 180 (1984) (reversing district court's exercise of jurisdiction over class action challenging Act's treatment of male and female spouses on equal protection grounds). Although Mrs. Johnson's jurisdictional argument is plausible, the logic of the precedents persuades us to reject it.

Section 10(b) of the Administrative Procedure Act says that "the form of proceeding for judicial review is the special statutory review proceedings relevant to the subject matter in a court specified by statute or, *in the*

absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction." 5 U.S.C. § 703 (1988) (emphasis added). We begin, therefore, by asking whether the statutory review proceedings govern Mrs. Johnson's claim and, if they do, whether the review they provide is adequate.

Decisions of the Board must be reviewed according to the terms of the Railroad Retirement Act of 1974, 45 U.S.C. § 231g (1988). The relevant section, "Claims for benefits," says that

> [f]indings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) [concerning 'Hearing and review of decisions on claims'] . . . shall not be subject to review in any manner other than that set forth in subsection (f) of this section.

45 U.S.C. § 355(g) (1988).

Subsection (f), in turn, says that "[a]ny claimant, or railway labor organization . . . of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after [exhausting administrative remedies], obtain a review of any final decision of the Board" in the U.S. Court of Appeals for the circuit in which he lives or works, or in the Court of Appeals for the District of Columbia Circuit or the Seventh Circuit.

Mrs. Johnson argues that § 355 refers (as its name suggests) to individual "claims for benefits," not to class actions challenging the Board's policies and practices. She

points to *McNary v. Haitian Refugee Center, Inc.*, ___ U.S. ___, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991), in which the Supreme Court recently decided that a similarly worded section of the Immigration Reform and Control Act of 1986 forecloses district court review of individual applications but not "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* 111 S.Ct. at 896. Just as the critical language in the Immigration Act refers to "a determination respecting an application," 8 U.S.C. § 1160(e) (1988), so Mrs. Johnson argues that the critical language in the Railroad Act refers to "the determination of any claim." 45 U.S.C. § 355(f).

We conclude, however, that the statutory review provision does govern Mrs. Johnson's case. First, the language in the Railroad Act is broader than the corresponding language in the Immigration Act. Subsection (f) of the Railroad Act refers not only to "the determination of any claim," but also to "the determination of any other matter" relating to the "review of decisions on claims." It also refers to judicial review of "any final decision," while the Immigration Act refers only to judicial review "of such a denial." Second, subsection (g) of the Railroad Act says that "[f]indings of fact and *conclusions of law*" shall be subject to review; while the Immigration Act refers only to "findings of fact and determinations contained in [the administrative] record." 8 U.S.C. § 1255a(f)(4)(B) (1988). The textual differences suggest to us that the Railroad Act contains a broader preclusion of district court jurisdiction than the Immigration Act does.

Although the text of the review provision seems to preclude district court jurisdiction, Mrs. Johnson argues that this court has already interpreted the legislative history to suggest a contrary result. Without deciding the jurisdictional question explicitly, we suggested in passing that "Congress did not have in mind a design to preclude class actions when it provided for direct review in the courts of appeals of decisions under the Railroad Retirement Act." *Burns v. United States R.R. Retirement Bd.*, 701 F.2d 189, 191 (D.C.Cir.1983). Before 1946, the district courts reviewed social security and railroad retirement determinations, while the courts of appeals reviewed determinations under the Railroad Unemployment Insurance Act. In the interest of economy and uniformity, Congress amended the Railroad Act so that cases involving both Railroad Acts would be resolved "in a single consolidated proceeding with a single court review." *Id.* at 191 (quoting S.REP. No. 1710, 79th Cong., 2d Sess., pt. 2, at 21 (1946)). The Board suggests that this shows an intent to prohibit class actions; and it points to a statement by Lester P. Schoene, who helped to draft the 1946 amendment on behalf of railway labor: "[T]he judgment of three members on the circuit court is bound to be more carefully thrashed out than the judgment of one man," he said. *Hearings on H.R. 1362 Before the House Comm. on Interstate and Foreign Commerce*, 79th Cong., 1st Sess., pt. 3, at 1083-93 (1946) ("House hearings"). But Mr. Schoene seems to have been referring to individual claims, not to class actions, and the Board does not explain why a labor representative would design a bill to shield illegal Board policies from national challenges by the wives of railway workers. We conclude, in any event, that even if the

legislative history raises questions about Congress's intent to preclude district court jurisdiction, they are not sufficient to overcome the text of the review provision, which seems relatively clear.

Having concluded that the statutory mechanism governs Mrs. Johnson's claim, we must now decide whether an exception is justified because the review offered is "inadequate" or less than "meaningful" within the meaning of the Administrative Procedure Act, 5 U.S.C. 703 (1988), *cf. McNary,* 111 S.Ct. at 898. The focus on the "adequacy" of judicial review is the one thread that runs throughout the cases; and it helps to reconcile decisions that appear to be irreconcilable, such as *Denberg* and *Linquist; McNary* and our recent decision in *Ayuda, Inc. v. Thornburgh,* 948 F.2d 742 (D.C.Cir.1991) (*"Ayuda IV"*). Mr. Denberg, for example, admitted that he could have gone to the court of appeals directly after the denial of his application. The *Denberg* court refused to find district court jurisdiction, noting that "[t]here was no problem of 'absence or inadequacy' of the special statutory review proceedings of section 5(f)." 696 F.2d at 1196. The *Linquist* court, by contrast, held that the district court *did* have mandamus jurisdiction over a challenge to the Social Security Administration and the Railroad Retirement Board. Direct review in the court of appeals was "inadequate," the court noted, because determinations of the social security administration are reviewed in the district court, and the defendants could not have been joined in a single proceeding before the court of appeals. 813 F.2d at 888.

In *McNary,* similarly, the Supreme Court noted "several aspects" of the statutory scheme that would preclude

"meaningful" review in the courts of appeals. First, the lack of an administrative record in deportation proceedings meant that courts of appeals would "have no complete or meaningful basis upon which to review application determinations." 111 S.Ct. at 898. Second, most aliens can obtain review in courts of appeals only if they voluntarily surrender themselves for deportation. "Quite obviously," the Court emphasized, "that price is tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* Third, to challenge the INS policies, the Haitian Refugee Center had to gather a host of evidence which would have been irrelevant in an administrative hearing and unattainable in a court of appeals, without "the factfinding and record-developing capabilities of a federal district court." *Id.* For all three reasons, the Supreme Court concluded that "restricting judicial review to the courts of appeals . . . is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.*

And then there is *Ayuda*, in which the Supreme Court asked this court to reexamine its interpretation of a parallel provision of the Immigration Act, 8 U.S.C. § 1255a (1988), in light of *McNary*. *See* 880 F.2d 1325 (D.C.Cir.1989), *vacated and remanded*, ___ U.S. ___, 111 S.Ct. 1068, 112 L.Ed.2d 1174 (1991). The panel found, on remand, no reason to revise its original position that the district court lacked jurisdiction over broad challenges to an INS policy or legal position that could apply to many determinations. It focused on the *McNary* Court's conclusion that an inadequate administrative record made it "unlikely that a court of appeals would be in a position to provide meaningful judicial review" of deportation

orders. 111 S.Ct. at 898. Since the administrative record in *Ayuda* was adequate, the panel concluded that judicial review was meaningful. *Ayuda IV,* 948 F.2d at 749.

In *McNary,* the Supreme Court noted that requiring aliens to turn themselves in for deportation before they can challenge INS policy "is tantamount to a complete denial of judicial review for most undocumented aliens." *McNary,* 111 S.Ct. at 898. The Seventh and Ninth Circuits have interpreted *McNary* to find district court jurisdiction over a challenge to a regulation limiting eligibility for legalization whose validity could have been raised by the alien plaintiffs in individual deportation proceedings. *See Catholic Social Servs., Inc. v. Thornburg,* 956 F.2d 914, 920-21 (9th Cir. 1992) (Hug, J.) *cert granted sub nom. Barr v. Catholic Social Servs.,* ___ U.S. ___, 112 S.Ct. 2990, 120 L.Ed.2d 867 (1992); *Morales v. Yeutter,* 952 F.2d 954 (7th Cir.1991) (Posner, J.). Although its application of the principle is disputed in these other circuits, *Ayuda's* focus on the adequacy of judicial review is consistent with the general logic of *McNary, Denberg,* and *Linquist.*

Applying that logic, we reject Mrs. Johnson's jurisdictional claim. Mrs. Johnson does not suggest that the relevant parties could not be joined in a single proceeding before the court of appeals, as in *Linquist,* 813 F.2d at 888. She does not suggest that the administrative record in her case is inadequate, as in *McNary;* nor does she suggest that claimants in her position have no access to judicial review because they fear a heavy penalty like deportation, or because the government refuses to deport them, as in *Ayuda.* 948 F.2d at 751.

Mrs. Johnson does argue forcefully that the Board's policy of nonacquiescence forecloses meaningful judicial review. The Board refuses to petition for Supreme Court review of adverse circuit court rulings in individual appeals, and at the same time, it continues to apply the rejected interpretation not only in other circuits, but to other individuals' claims in the same circuit. The practical effect of this policy, Mrs. Johnson says, is to insure that few claimants will actually obtain the relief to which federal courts say they are entitled by law. We agree that the Board's policy raises grave constitutional and statutory questions, and we will address them below. But we are not persuaded that the policy is "tantamount to a complete denial of judicial review" for most claimants, as in *McNary;* especially because if the nonacquiescence policy is unlawful, we think it can be directly challenged before our court. Because we can provide meaningful review to spouses and widows who have the patience and means to seek it, we affirm the district court's conclusion that it lacked jurisdiction over the class action, and we turn to the merits of Mrs. Johnson's claim.

B. *Mrs. Johnson's Entitlement*

Two circuit courts have reviewed the "tortuous" history of the relationship between the Railroad Act and the Social Security Act, and rejected the Board's interpretation. *See Costello v. United States R.R. Retirement Bd.,* 780 F.2d 1352 (8th Cir. 1985); *Johnson v. United States R.R. Retirement Bd.,* 925 F.2d 1374 (11th Cir. 1991). We join the Eighth and Eleventh Circuits and reject the Board's position once more.

The Railroad Act says clearly that a qualified spouse "shall . . . be entitled to a spouse's annuity . . . in the amount provided under 231c of this title" if, "in the case of a wife, [she] has in her care . . . a child who meets the qualifications prescribed in (iii) of section (d)(1). . . . " 45 U.S.C. § 231a(c) (1988). Section (d)(1)(iii) defines "child" as one who is under 18 years of age.

Section 231c(a), in turn, defines the amount of the entitlement:

> (1) The annuity of a spouse . . . shall be in an amount equal to the amount . . . of the wife's insurance benefit . . . to which such spouse *would have been entitled* under the Social Security Act . . . if such individual's service as an employee after December 31, 1936, had been included in the term "employment" as defined in the [Social Security] Act.

45 U.S.C. § 231c(a) (1988) (emphasis added).

There was no conflict between the Railroad and Social Security Acts before 1981, since the eligibility requirements in both were the same. In 1981, however, as part of the Omnibus Budget Reconciliation Act, Congress cut Social Security Benefits by lowering the age of termination for children's benefits under the Social Security Act from 18 to 16. Pub.L. No. 97-35, § 2205, 95 Stat. 357 (amending 42 U.S.C. § 402(s)(1)). It did not amend the parallel provision in the Railroad Act. The question, therefore, is whether Congress intended spousal annuitants under the Railroad Act, like the Social Security act, to lose their benefits once their children turn sixteen.

The Board's initial response to the question was remarkably wooden. In 1981, it issued a legal opinion insisting that "[t]he eligibility provisions of the Railroad Retirement Act were not affected by" the Omnibus Budget Act and that spouses and widows remain "entitled to a benefit as long as they have a minor child of the employee under age 18 in their care and custody." Legal Opinion L-81-193. The Opinion interpreted the amended Social Security Act, however, to reduce the Tier I *amount* due to widows and spouses with children between sixteen and eighteen to "zero." Those whose Tier II benefits were calculated as 30% of Tier I would receive "zero" Tier II benefits as well. *Id.*

In *Costello*, the Eighth Circuit held that the Board's interpretation lacked a reasonable basis in law because it forces annuitants to meet the eligibility requirements of *both* statutes, even though the Railway Act refers to the Social Security Act only for the purpose of determining the *amount* an eligible Social Security annuitant *would have received*. "Determination of the amount of an annuity," the court concluded,

> has two distinct steps. The threshold question is whether a claimant is entitled to an annuity. For this first question, one refers to the entitlement section of the appropriate act. If, under either act, entitlement exists, the second step is to refer to the social security regulations to determine the amount of benefits.

780 F.2d at 1355; *see also Johnson*, 925 F.2d at 1377.

In response to the *Costello* decision, the Board issued a new policy in 1986, which Mrs. Johnson now challenges. The Board continues to maintain that widows and

spouses are entitled to "zero" Tier I benefits after their children turn sixteen, even though *Costello* requires the opposite. But in an abrupt change, it has agreed to pay Tier II benefits to all widows until their children turn eighteen, even those whose Tier II benefits are required to be calculated as 30% of Tier I. Legal Opinion L-86-112.

The parties disagree about the appropriate level of deference to be applied. Both the Eighth and Eleventh Circuits held that the Board interpreted both the Railroad Act and the Social Security Act and considered their interrelationship. Because the Board was interpreting matters outside of its expertise – the Social Security amendments – it was not entitled to deference. *See Johnson,* 925 F.2d at 1378; *Costello,* 780 F.2d at 1354. The Board insists that the meaning of the Social Security Act is not in question. It is the Railroad Act that tells the Board to look to the Social Security Act, and the Board must decide whether the Railroad Act refers to the eligibility or merely the computational requirements of the Social Security Act. Since it claims merely to be interpreting its governing statute, the Board says it is entitled to deference.

We agree with the Eighth and Eleventh Circuits that the Board is not entitled to deference because it is not interpreting its governing statute alone, but rather the relationship between the Railroad Act and the Social Security Act. *See Costello,* 780 F.2d at 1354; *see also Johnson,* 925 F.2d at 1378. Therefore, *Chevron* does not apply.

The Supreme Court has emphasized recently that a "precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams*

Fruit Co. v. Barrett, 494 U.S. 638, 110 S.Ct. 1384, 1390, 108 L.Ed.2d 585 (1990). The reason is clear: *Chevron* review of agency interpretations of statutes applies only to regulations "promulgated pursuant to congressional authority," *NLRB v. United Food & Commercial Workers Union* 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). If agencies are simply interpreting a statute, but have not been granted the power to "administer" it, the principle of deference applies with less force. *See, e.g., Crandon v. United States*, 494 U.S. 152, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring in the judgment) (more "specific responsibility for administering the law" is needed to trigger *Chevron*).

"Under the law of this circuit," similarly, "when an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference." *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C.Cir.1988). We have held repeatedly that when an agency interprets a general statute rather than its organic statute, this court is not bound by its construction, even if reasonable, but should engage in de novo review – guided, of course, by congressional intent. *Professional Airways Sys. Specialists v. FLRA*, 809 F.2d 855, 857 n. 6 (D.C.Cir.1987); *see also AFGE, Local 2782 v. FLRA*, 803 F.2d 737, 740 n. 1 (D.C.Cir.1986).

Our colleague suggests that we should defer to the Board because "the nature of the relationship between the Railroad Retirement and Social Security Acts is defined entirely by the former." Dis.Op. at 1095. With respect, we think it equally plausible to say that the nature of the relationship is defined by the latter. The central event in this case is the 1981 amendment to the Social Security

Act, which cut off eligibility to spouses when their children reached sixteen. In light of the Social Security Amendments, the Board has decided, in effect, that Railroad annuitants must meet the entitlement requirements of the Social Security Act *and* the Railroad Act. *Costello*, 780 F.2d at 1354. Although the Board tries to resist the implication, its position rests on an unconvincing premise about the intention of the framers of the Social Security Act: "Congress did not need to amend the [Railroad] Act because it knew sections 4(a)(1) and 4(f)(a) would incorporate any changes" in the Social Security Act. Brief for Respondent at 45. But the Board has no special expertise about the purpose of the Social Security Amendments. And the Board's attempts to justify its interpretation by referring to the Railroad Act alone are unpersuasive: It is, after all, a *relationship* we are construing.

There is no need to labor the debate about deference, however: even if we were to apply *Chevron*, we would be hard pressed to sustain the Board's interpretation as "reasonable" under step two. (There is no evidence that Congress "spoke directly to the precise question at issue" under step one, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)). The Omnibus Budget Act was, as its name suggests, massive, and the amendment to section 402(s) inspired no recorded debate. We agree with the Eighth and Eleventh Circuits that if Congress really had intended to reduce the entitlement requirements under the Railroad Act from age 18 to age 16, it would have done so explicitly. *Johnson*, 925 F.2d at 1379; *Costello*, 780 F.2d at 1355. Congress did, in fact, go out of its way to amend other subsections of the Railroad Act,

and other subparts of the subsection in question, *see* Omnibus Act § 1117(c) (adding 45 U.S.C. § 231a(d)(1)(v)), but it left the 18-year-old cut-off date in 231a(d)(1) conspicuously intact. Like the Eighth and Eleventh Circuits, we think it unreasonable to conclude that Congress meant to create an entitlement with one hand and snatch it away with the other.

Rephrasing the question, our colleague thinks it reasonable to conclude that if Congress had intended to maintain Tier I payments at the pre-1981 level, it would have said so explicitly and provided for their funding. Dis.Op. at 7. But the text of the Railroad Act suggests the opposite. Section 231r of the Act, "[a]utomatic benefit eligibility requirement adjustments," says that if Congress amends the Social Security Act to *reduce* eligibility requirements or to *add* classes of eligible beneficiaries, the changes shall be automatically applicable to section 231a railroad retirement annuity claimants. We agree with the Eighth Circuit that this section suggests Congress's intention that automatic adjustments are appropriate only when eligibility requirements are liberalized, rather than restricted, and that an explicit authorization is necessary to reduce Railroad annuities. *Costello*, 780 F.2d at 1356. Given Congress's detailed amendments of other sections of the Railroad Act in 1981, and given the remedial purposes of the Act, we think it unreasonable to infer an affirmative intent to cut off benefits from Congress's decision *not* to amend section 231c(i)(1).

The Board, finally, insists that its interpretation is compelled by the plain meaning of the Railroad Act. But it lacks the courage of its textualist convictions. The Board's initial position, although implausible, at least had

the virtue of a wooden logic. (According to the 1981 Legal Opinion, the Social Security amendments left the "entitlement" provisions of the Railroad Act unchanged, but reduced the "amount" of the Tier I benefits to zero; Tier II benefits calculated as 30% of Tier I were reduced to zero as well). But the Board's response to *Costello* is not logical. Although the Board insists that the plain meaning of the Railroad Act reduces Tier I benefits to zero, it has agreed to pay Tier II benefits to all widows until their children turn eighteen, even to those whose Tier II benefits are calculated as 30% of Tier I. Legal Opinion L-86-112. Unless 30% of zero makes more than zero, the Board's arithmetic is bizarre. Its new position cannot be defended as a literal interpretation of the Railway Act (which, according to the Board's logic, would require certain Tier II benefits to be "reduced to zero"). It also cannot be defended as a faithful effort to acquiesce in a judicial decision with which the Board disagrees (the *Costello* decision requires Tier I *and* Tier II benefits to be paid).

Our colleague would "summarily" ignore the illogic of the Board's position because the issue of survivor's (as opposed to widow's) benefits is not formally before us. Dis.Op. at 1097. But "[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988). The fact that the Board's "plain meaning" interpretation is patently unreasonable when applied to one section of the statute calls into question the reasonableness and coherence of the Board's position as a whole.

For all these reasons, we reverse the Board's order and remand with directions to award to Mrs. Johnson a Tier I spouse's annuity for the period that began with the termination of her annuity and which ended when her youngest child turned eighteen.

C. *Nonacquiescence*

"We have been grossly unjust," the dissenting Board member wrote, in refusing to follow the *Costello* case, even within the Eighth Circuit. "Moreover," he added, "the Court may severely criticize us for our handling of these cases." He was correct.

In response to the *Costello* case, the Board refused to pay Tier I benefits even within the Eighth Circuit, unless claimants complete the administrative process, which includes an initial decision, reconsideration, a hearing before a referee, and a final decision by the three-member Board itself. 20 C.F.R. § 259. At oral argument before this court, furthermore, the Board repeated its extraordinary position that an agency is not bound to respect the pronouncements of a U.S. Court of Appeals, even within its own circuit. Mrs. Johnson challenged the constitutionality of the nonacquiescence policy in her complaint, and asked for, among other things, mandamus relief. We think such a dramatic step would be premature, since the Board has not announced definitively that it will refuse to acquiesce in our decision today; and in the interest of judicial restraint, we will give the Board a chance to reconsider its position in light of our opinion. To inform the Board's response, however, we think it useful to suggest why the Board's policy is inconsistent with the

Board's jurisdictional arguments and troubling on statutory and constitutional grounds.

First, the Board's entire jurisdictional argument is based on the claim that Congress put great stock on the efficiency and expertise of appellate review. But the same legislative history the Board quotes to suggest that Congress intended to preclude district court jurisdiction also suggests that Congress expected the Board to respect circuit court decisions rather than to defy them. The Board put particular emphasis on the testimony of Mr. Schoene, the labor representative, who showed a special concern for avoiding the "further expense" of additional appeals that would be forced on a claimant if she lost in the district court. *House Hearings* at 1083-93 (1946). Yet the Board itself has put claimants to further expense and meaningless appeals by forcing them to exhaust their administrative remedies before they can receive benefits. Mr. Schoene also noted that "more careful consideration will be given to the entire case . . . in the circuit court of appeals," *id;* and the Board took great pains to argue that Congress intended appellate judges to apply their expertise to legal challenges to the Board's policies. Now, however, the Board refuses to respect the "expert" judgments of appellate courts.

The Board's refusal to acquiesce, in short, undermines all of the advantages of appellate review that the Board insists Congress intended to recognize. To the degree that the Board's policy clashes with the intent of the framers of the Railroad Act, it cannot be sustained. More generally, defenders of nonacquiescence rely heavily on the premise that the "current administrative

landscape" suggests an "implicit authorization of nonacquiescence," Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 729 (1989). Evidence that Congress intended the opposite in this case leaves the argument without a foundation.

The Board's position also ignores basic rules of legal precedent, which are governed not by an inherent judicial hierarchy, but by the mechanisms of review provided by Congress. State courts, for example, are bound to follow Supreme Court precedent because if they do not, they can be reversed. Federal courts of appeals, by contrast, do not review state decisions, so their decisions are not generally considered binding precedent in state courts. In the current tax court, similarly, identical cases on the merits may receive different dispositions, because they are appealable to different federal circuits. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L.Rev. 205, 258-59 n. 170 (1985). The Board's refusal to acquiesce even in cases it knows will be appealed to the Eighth Circuit defies Congress's plan in making decisions under the Railroad Act reviewable by the courts of appeals in which the injury arose.

On the broadest level, the Board's position raises serious statutory and constitutional questions. Intracircuit nonacquiescence has been condemned by almost every circuit court of appeals that has confronted it. *See, e.g., Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir.1986), *cert. denied*, 484 U.S. 820, 108 S.Ct. 79, 98 L.Ed.2d 41 (1987); *Stieberger v. Bowen*, 801 F.2d 29, 36-37 (2d Cir.1986); *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir.1984); *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.1984), *vacated on other grounds and remanded*, 469 U.S. 1082, 105 S.Ct. 583, 83

L.Ed.2d 694 (1984) (mem.); *Childress v. Secretary of Health & Human Servs.*, 679 F.2d 623, 630 (6th Cir.1982). The only suggestion to the contrary is *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 384-85 (D.C.Cir.1983), in which Judge Wright suggested, in a concurring opinion, that the NLRB is "free to decline to follow decisions of the courts of appeals with which it disagrees, even in cases arising in those circuits." *Id.* at 384. But the NLRB's nonacquiescence is not strictly "intracircuit" at all: It occurs because a broad venue statute often forces the agency to act without knowing which circuit court ultimately will review its actions. *See, e.g.*, Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L.REV. 1339, 1348 (1991). The *Yellow Taxi* case, for example, arose in Minnesota but was reviewed in our Circuit. True intracircuit nonacquiescence, by contrast, occurs when an agency *does* know which court of appeals will review its actions and yet refuses to follow the rulings of the reviewing court. That is precisely what the Railroad Retirement Board has chosen to do in the Eighth Circuit.

There is, of course, some venue uncertainty under the Railroad statute: Mrs. Johnson's case arose in Kentucky and was appealed to our circuit. But the Board has never attempted to invoke venue uncertainty to justify its actions, and it seems to be asserting a right of nonacquiescence in its most sweeping sense.

Several courts have questioned the constitutionality of intracircuit nonacquiescence with broad references to *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). *See, e.g., Stieberger v. Heckler*, 615 F.Supp. 1315, 1356-58 (S.D.N.Y.1985), *prelim. inj. vacated sub nom.*

Stieberger v. Bowen, 801 F.2d 29 (2d Cir.1986); *Lopez*, 725 F.2d at 1497 n. 5. But it is not necessary to accept the *Cooper* analogy to criticize the Board's policy in this case. In *Cooper*, the Supreme Court said that its interpretations of the Constitution are binding on state officials, even on those who were not parties to the case or bound by a court order. *Marbury*, according to the *Cooper* Court, "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"; therefore, the Court concluded, judicial interpretations of the Constitution are the "supreme law of the land," and state officials are bound by oath to follow them. 358 U.S. at 18, 78 S.Ct. at 1410. Circuit courts, for their part, have compared the nonacquiescence of federal agencies to the defiance of Governor Faubus at Little Rock, noting that "[w]hat the [*Cooper*] Court said with regard to the Constitution applies with full force with regard to federal statutory law." *Lopez*, 725 F.2d at 1497 n. 5.

Defenders of nonacquiescence argue that the *Cooper* analogy is inexact. Although *Cooper* speaks not of the Supreme Court but of "*the federal judiciary* [as] supreme in the exposition of the law of the Constitution," 358 U.S. at 18, 78 S.Ct. at 1410 (emphasis added), the decision seems to assume that "the law forming the basis for the obligation to acquiesce is no longer in flux." Estreicher & Revesz, 98 YALE L.J.at 725. Supreme Court decisions, the argument goes, should be followed in the interests of national uniformity; but until the Supreme Court has spoken, agencies have argued that their responsibility to formulate "uniform and orderly national policy in adjudications" allows them to refuse to acquiescence in the conflicting views of U.S. Courts of Appeals. *See, e.g., S &*

H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1278 (5th Cir. Unit B Oct.1981). At oral argument before this court, similarly, the Railroad Board emphasized its responsibilities as a "nationwide authority." This Board offered no other arguments to defend its policy.

But even if we assume, for the sake of argument, that an interest in national uniformity might justify nonacquiescence in *some* cases, the sincerity of the Railroad Board's interest in uniformity is open to question. When an agency honestly believes a circuit court has misinterpreted the law, there are two places it can go to correct the error: Congress or the Supreme Court. The Railroad Retirement Board has done neither. It has not asked Congress to clarify its intentions, even after two circuits said it had misunderstood Congress's intentions. More remarkably, it has failed to petition the Supreme Court for certiorari, even in the decisions it claims to believe were wrongly decided. The Board appears, as a result, to be less interested in national uniformity than in denying benefits one way or another.

The Board, in the end, can hardly defend its policy of selective nonacquiescence by invoking national uniformity. The policy has precisely the opposite effect, since it results in very different treatment for those who seek and who do not seek judicial review. If a Railroad spouse, like a social security claimant,

> has the determination and the financial and physical strength and lives long enough to make it through the administrative process, he can turn to the courts and ultimately expect them to apply the law as announced [by the Circuit]. If

> exhaustion overtakes him and he falls somewhere along the road leading to such ultimate relief, the nonacquiescence and the resulting termination stand. Particularly with respect to the types of individuals here concerned, whose resources . . . are by definition, relatively limited, such a dual system of law is prejudicial and unfair.

Lopez v. Heckler, 572 F.Supp. 26, 28 (C.D.Cal.1983).

Conceding the lack of vertical uniformity – similar treatment of all claimants in the same circuit – defenders of nonacquiescence have tried to point to the benefits of what they call horizontal uniformity – similar treatment of all national claimants in initial agency proceedings. At the same time, they acknowledge that horizontal uniformity is not an end in itself, but a means to other values, such as fairness. *See, e.g.*, Estreicher & Revesz, 98 YALE L.J. at 748. It is a peculiar view of fairness, however, that treats all claimants equally poorly by depriving them of benefits they will eventually receive if they have the fortitude to run an administrative gauntlet. This looks uncomfortably like the frivolous and obstructionistic litigation that the Supreme Court has severely criticized in the context of habeas corpus. *See, e.g., McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1468-69, 113 L.Ed.2d 517 (1991).

Because of the venue provisions of the Railroad Act, furthermore, *any* claimant who is denied Tier I benefits in the future can eventually receive benefits by seeking review in our circuit. *See* 45 U.S.C. § 355(f) (1988). It is hard to see the fairness of a policy that guarantees benefits to those who can afford to appeal in the District of

Columbia and denies benefits to those who cannot. Under these circumstances, the interests of both fairness and national uniformity suggest that the Board should consider reinstating Tier I benefits in all jurisdictions.

Ordinarily, or course, the arguments against *inter*-circuit nonacquiescence (which occurs when an agency refuses to apply the decision of one circuit to claims that will be reviewed by another circuit) are much less compelling than the arguments against *intra*circuit nonacquiescence. Although the decision of one circuit deserves respect, we have recognized that "it need not be taken by the Board as the law of the land." *Givens v. United States R.R. Retirement Bd.*, 720 F.2d 196, 200 (D.C.Cir.1983). When the Board's position is rejected in one circuit, after all, it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion. And there is an additional value to letting important legal issues "percolate" throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 572, 78 L.Ed.2d 379 (1984). But now that three circuits have rejected the Board's position, and not one has accepted it, further resistance would show contempt for the rule of law. After ten years of percolation, it is time for the Board to smell the coffee.

In light of our decision today, we hope that the board will choose to abandon its policy of intracircuit nonacquiescence, as the Social Security Administration did after being severely criticized by the Courts and by Congress. *See, e.g.*, H.R.CONF.REP. No. 1039, 98th Cong., 2d Sess. 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038, 3080,

3096. But if the Board persists, we expect that the policy of nonacquiescence itself could be considered a "final decision of the Board" under 45 U.S.C. § 355(f) that could be challenged by a spouse or widow in an appropriate action before this court. *Cf. Bowen v. City of New York*, 476 U.S. 467, 486, 106 S.Ct. 2022, 2033, 90 L.Ed.2d 462 (1985); *Hyatt*, 807 F.2d at 380.

III. Conclusion

We affirm the district court's dismissal of the complaint for lack of jurisdiction. We reverse the Board's order and remand with directions to award Mrs. Johnson a Tier I spouse's annuity for the period which began with the termination of her annuity and which ended when her youngest child turned eighteen.

It is so ordered.

BUCKLEY, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion that the district court lacked jurisdiction over the class action. I dissent, however, from its rejection of the Railroad Retirement Board's denial of Tier I benefits for Mrs. Johnson. As I find 45 U.S.C. § 231c(a)(1) ambiguous and the Board's interpretation of it permissible, I believe we are obliged to accede to the Board's disposition of her claim. *See Chevron U.S.A. Inc. V. NRDC, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). I also write separately to comment on the majority's discussion of nonacquiescence by federal agencies in circuit court decisions.

I. Background

A. The Railroad Retirement Act and Social Security

The Railroad Retirement Act ("RRA"), 45 U.S.C. §§ 231 et seq. (1988), is a complex statute. As it has evolved, the Act provides qualified individuals with two categories of sometimes overlapping benefits. The first, known as "Tier I," provides benefits at least equal to those available under the social security system's old age, survivors, and disabled insurance programs. Although there are certain differences between the two systems, Tier I benefits are generally predicated on those available under equivalent provisions of the Social Security Act ("SSA"). *See, e.g., id.* §§ 231b(a)(1), 231c(a)(1), and 231c(f)(1). The RRA also provides a second, "Tier II" category of benefits. These are payable in addition to the first and are calculated on the basis of such factors as length of service and pay. *See id.* § 231b(b); *see also id.* §§ 231c(b), (g).

The change to a two-tiered system was initiated in 1951 with the adoption of major amendments to the RRA. *See* Pub.L. No. 82-234, § 7, 65 Stat. 683, 684-85 (1951). At the same time, Congress established a financial interchange between the railroad retirement and social security systems: The Railroad Retirement Account would thereafter transfer to the social security trust funds the amount that would have been paid into them if the railroad employees had been covered under the SSA; the trust funds, in turn, would transfer to the Railroad Retirement Account the amounts that the railroad beneficiaries would have drawn from those trust funds if they had been covered by the SSA. *See id.* § 22(b), 65 Stat. at 687-88

(1951) (codified as amended at 45 U.S.C. §§ 231f(c), 231n (1988)).

B. Ruling Under Review

In May 1989, the Board affirmed and adopted the Appeals Referee's finding that Mrs. Johnson "[was] entitled to tier I as well as tier II after her youngest child attained age 16," but that the provision governing the computation of spousal annuities required that her Tier I payments be "reduced to zero." Decision of the Appeals Referee, Bureau of Hearings and Appeals, U.S. Railroad Retirement Board at 5 (July 12, 1988) ("Appeals Referee Decision"), *reprinted in* Appendix ("App") at 32. This finding was based on the Board's interpretation of section 4(a)(1) of the RRA, as codified, which provides that "[t]he annuity of a spouse . . . [having the care of a child under eighteen] shall be in an amount equal to the amount . . . such spouse . . . would have been entitled under the Social Security Act."

It was the Board's view that this section required it to determine whether Mrs. Johnson would have qualified for an annuity under that statute. Accordingly, the Board consulted section 202 of the SSA, as codified, which provides that a spouse's right to an annuity is "subject to subsection (s)." 42 U.S.C. § 402(b)(1) (1988). Prior to 1981, subsection (s) enabled a spouse to receive social security benefits for a child under the age of eighteen, the same age specified in the RRA. *See id.* § 402(s)(1) (1976); 45 U.S.C. 231a(d)(1)(iii) (1976). In 1981, however, Congress amended subsection (s) to cut off child-related social

security benefits at the age of sixteen. *See* Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, § 2205(a)(1), 95 Stat. 357, 837 (1981) ("1981 Budget Act"); *see also* 42 U.S.C. § 402(s)(1) (1988). As a consequence, the Board concluded that although the RRA authorized a Tier I annuity for a child up to the age of eighteen, the amount payable for one who had reached sixteen was zero. *See* Appeals Referee Decision at 4, *reprinted in* App. at 31.

II. Applicability of *Chevron*

Chevron holds that when a provision of an agency's organic statute is ambiguous with respect to a particular issue, a court must defer to the agency's interpretation of the provision so long as it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782. The majority and the courts in *Costello v. United States R.R. Retirement Bd.*, 780 F.2d 1352 (8th Cir.1985), and *Johnson v. United States R.R. Retirement Bd.*, 925 F.2d 1374 (11th Cir.1991), maintain that the Board is owed no deference because, in their view, it wandered off its own reservation when it reached its conclusion that Mrs. Johnson was not entitled to receive Tier I benefits for the care of her sixteen-year-old stepdaughter.

In the words of *Costello*, which are echoed in *Johnson*,

> the Board interpreted both the Railroad Retirement Act and the Social Security Act, and considered their interrelationship. Thus, the Board was dealing with matters not totally within its area of expertise.

Costello, 780 F.2d at 1354; *see also Johnson*, 925 F.2d at 1378 (same). With great respect, this is equivalent to a finding

that the Internal Revenue Service's interpretation of a tax indexation provision is not owed deference because the Internal Revenue Code requires reference to the Bureau of Labor Statistics' Cost of Living Index, as to which the IRS has no expertise. Here, the nature of the relationship between the Railroad Retirement and Social Security Acts is defined entirely by the former; the latter only determines the dollar amount that a Tier I spousal annuitant is to receive. Where one is to look in the SSA in order to identify that amount depends exclusively on how one construes section 4(a)(1) of the RRA. Once that is decided, the computation of the amount payable is a simple matter. It takes no expertise in social security law to determine what a spousal annuitant will receive under the SSA, or that section 202(s) of the SSA, as amended by the 1981 Budget Act, reads "16" rather than "18."

In a similar vein, the majority tries to avoid the mandate of *Chevron* by constructing a straw man. It does so by positing a question that the Board, in interpreting an unamended RRA, saw no need to ask and therefore did not answer; namely, "whether Congress [when it amended the SSA] intended spousal annuitants under the Railroad Act, like the Social Security Act, to lose their benefits once their children turn sixteen." Maj.Op. at 1087. The majority then seizes upon an isolated statement in the Board's brief – " 'Congress . . . did not need to amend the [Railroad] Act because it knew section[] 4(a)(1) [section 231c(a)(1) as codified] . . . would incorporate any changes' in the Social Security Act," *id.* at 1089 (quoting Brief for Respondent at 45) – to declare that the Board's position is premised on its understanding of Congress's intent when it amended the SSA.

The problems with this conclusion are manifest. As in the ruling under review, *see* Appeals Referee Decision at 4-6, *reprinted in* J.A. at 31-33, the Board does in fact justify its decision on the basis of the Railroad Act alone. *See* Brief for Respondent at 25 ("II. TERMINATION OF MS. JOHNSON'S TIER I ANNUITY COMPONENT IS A PERMISSIBLE INTERPRETATION OF Section 4(a)(1) [45 U.S.C. § 230c(a)(1)]"); *id.* at 27-31 (text of RRA supports Board's interpretation of the RRA); *id.* at 31-34 (statutory structure of RRA supports same); *id.* at 34-41 (legislative history of RRA supports same).

Moreover, the Board's statutory argument is in no sense premised on the statement quoted by the majority. That statement appears in a separate section of the Board's brief, Part III, that is devoted to a rebuttal of arguments advanced in *Costello* and *Johnson*. The courts in those cases contended that as Congress had failed, when it amended the SSA, to enact a parallel age reduction in the RRA, Congress must have intended that the Tier I benefits remain payable until a child reached the age of eighteen. It was in response to this contention that the Board stated: "Both courts miss the point; Congress did not need to amend the Act because it knew section 4(a)(1) . . . would incorporate any changes." Brief for Respondent at 45. Nothing in this statement suggests that the Board premised its interpretation of the RRA on its assumption that Congress was aware of the consequences of its later amendment of the SSA. As the Board noted in the preceding paragraph, "*Costello* and *Johnson* notwithstanding, . . . this is clearly an interpretation of the RRA." *Id.*

As the agency in fact based its case on its interpretation of section 231c(a)(1), *Chevron* applies. Our inquiry, then, must turn to whether that section is ambiguous; and if so, whether the Board's construction is permissible. The provision reads, in substantial part, as follows:

> The annuity of a spouse . . . of an individual under section 231a(c) of this title shall be in an amount equal to the amount . . . of the wife's insurance benefit or the husband's insurance benefit to which such spouse . . . would have been entitled under the Social Security Act . . . if such individual's service as an employee after December 31, 1986, had been included in the term "employment" as defined in that Act.

45 U.S.C. § 231c(a)(1). The *Costello* and *Johnson* courts take the position that the section establishes "two distinct steps" for the determination of the amount that is to be paid a caretaker spouse under Tier I:

> The threshold question is whether a claimant is entitled to an annuity. For this first question, one refers to the entitlement section of the appropriate act. . . . If, under either [the RRA or SSA], entitlement exists, *the second step is to refer to the social security regulations to determine the amount of benefits.*

Costello, 780 F.2d at 1355 (emphasis added); *see also Johnson*, 925 F.2d at 1377 (citing *Costello*). The Board has a very different view of the statute. It concludes that the amount Mrs. Johnson may be paid under the RRA is that amount to which she would have been entitled if her husband's employment had been credited under the SSA and she had applied for a benefit thereunder.

As both of these interpretations are tenable, it seems clear enough that the section is ambiguous. The majority agrees. *See* Maj.Op. at 1089 ("There is no evidence that Congress 'spoke directly to the precise question at issue' under step one."). That being the case, we must determine whether the Board's construction is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987). There can be no question that the language of section 231c(a)(1) is susceptible to the Board's interpretation. The Supreme Court reminds us, however, that in construing a particular provision, a court must look to "the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988). I believe the Board's interpretation meets this test. It is fully consistent with the statute's two-tiered structure and with the financial interrelationship that exists between the railroad retirement and social security systems.

When Congress restructured the RRA, it established a substantial parity between Tier I benefits and those available under the social security system's old age, survivors, and disabled insurance programs. Moreover, it created a mechanism that results in the use of social security trust funds to pay Tier I annuities. One consequence of this arrangement is that to the extent that Tier I benefits exceed those payable under the social security system, any shortfalls must be met out of funds that are earmarked for the payment of Tier II benefits. The 1981 Budget Act changed neither the text nor the meaning of

section 231c(a)(1). Under the Board's reading of the section, the parity in benefits under the two systems is maintained, and the financial problem that would result from a disparity between Tier I and SSA spousal benefits is avoided. In sum, there was simply no reason for the Board to conclude that Congress had decided, in 1981, to sever the link it had earlier forged between the two systems.

The majority and the *Costello* and *Johnson* courts nevertheless insist that if Congress had intended to reduce the RRA benefits in 1981, it would have said so explicitly. *See* Maj.Op. at 1089; *Costello*, 780 F.2d at 1355; *Johnson*, 925 F.2d at 1379. Given the structure of the RRA and its linkage to the SSA, I think it just as reasonable to suggest that if Congress had intended to de-link the two systems and maintain Tier I payments at the pre-1981 level, it would not only have said so, it would have provided for their funding. In the absence of any expression of a congressional intent to change the relationship between Tier I and social security spousal benefits, it is hardly surprising that the Board should apply the RRA as it was written.

The majority's attempt to buttress its argument by reference to section 231r of the RRA is equally unavailing. As the majority notes, this section of the Act provides that any action taken by Congress to increase social security benefits or eligibility shall be "automatically applicable" to railroad retirement annuity claimants. Maj.Op. at 15. It says nothing, however, about legislation that tightens eligibility or reduces benefits. This is not surprising, as the provision was enacted in 1974 when amendments to the SSA had historically increased eligibility. *See*

Pub.L. No. 93-445, § 101, 88 Stat. 1305, 1350 (1974); *see also* H.Rep. No. 1345, 93rd Cong., 2d Sess. 8-9 (1974) (discussing recent "liberalizations in eligibility requirements for social security benefits"); S.Rep. No. 1163, 93rd Cong., 2d Sess. 8-9 (1974), 1974 U.S.C.C.A.N. 5702 (same). At most, section 231r gives rise to a statutory ambiguity that, under *Chevron*, is for the agency to resolve. As it is, the majority engages in sheer speculation when it concludes that Congress, in enacting section 231r, intended that "an explicit authorization is necessary to reduce Railroad annuities." Maj.Op. at 1089.

The majority claims, finally, that because the Board reversed its treatment of *Tier II* payments with respect to certain *survivor's* annuities (it had denied them to the petitioner-survivor in *Costello*), it would be "hard pressed to sustain the Board's interpretation as 'reasonable.' " Maj.Op. at 1089. This claim can be dealt with summarily. This case is about a *spouse's Tier I* benefits. Whatever the logic or illogic of the Board's treatment of Tier II benefits for survivors, that issue is not before us. *See* Brief for Petitioner at 35 n. 13.

III. Nonacquiescence

Although dicta, the majority's discussion of agency nonacquiescence suggests that we may be prepared to draw some rather hard lines on the matter. While I share the majority's exasperation with the Board's refusal to apply the *Costello* ruling to claims arising within the Eighth Circuit, there are circumstances where intracircuit nonacquiescence may be justified. *See Estreicher & Revesz, Nonacquiescence by Federal Administrative Agencies*, 98 Yale

L.J. 679, 743-53 (1989). In this instance, I can see no extenuating circumstances, especially in light of the bureaucratic obstacles a claimant must overcome before she can petition for judicial review. Nevertheless, I would not want us to leave the impression that this court will find intracircuit nonacquiescence unacceptable under any and every circumstance.

Nor should we suggest a rigid rule of "three strikes and out," as the majority does in the case of intercircuit nonacquiescence. *See* Maj.Op. at 1093. It is easy enough to say that when an agency is reversed on an important issue, its proper course is to appeal to Congress or the Supreme Court. Catching Congress's ear, however, is more easily said than done; and given the huge volume of petitions for certiorari that flood the Supreme Court, it is often necessary to establish a split among the circuits before the Court will examine an issue. If an agency is confident enough of its own position, I would be reluctant to establish an arbitrary limit on the intercircuit waters it would be allowed to test.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-1243

Nancy Johnson,

Petitioner

v.

United States Railroad Retirement Board,

Respondent

September Term, 1992
CA 89-2626

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and Consolidated Case No. 90-5380

(Filed Sept. 11, 1992)

BEFORE: Mikva, Chief Judge; Wald and Buckley, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing in case No. 90-5380, filed August 21, 1992, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nancy Johnson, *et al.*, Plaintiffs, v. United States Railroad Retirement Board, Defendant.	Civil Action No. 89-2626

ORDER

(Filed July 12, 1990)

Plaintiff, the fifty-nine-year-old spouse of a disabled railroad employee, is seeking review of the decision of the United States Railroad Retirement Board ("Board") to terminate her Tier I benefits on the ground that her child had reached the age of sixteen. In additional to suing on behalf of herself, plaintiff is suing on behalf of all spouses of railroad employees who are similarly situated. Now before the Court is the defendant's motion to dismiss plaintiff's case pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Upon consideration of the defendant's motion, the supporting and opposing legal memoranda, and the underlying law, the Court concludes that it lacks subject matter jurisdiction over this case. Accordingly, the Court will transfer the case to the United States Court of Appeals for the District of Columbia pursuant to 28

U.S.C. § 1631 because jurisdiction properly lies in that court and such transfer would be in the interest of justice.[1]

Decisions of the Board must be reviewed in the same manner as decisions made pursuant to the Railroad Unemployment Insurance Act ("Act"). 21 U.S.C. § 231g. After the exhaustion of all administrative remedies, a person aggrieved by a decision made pursuant to the Act may file a petition for review "in the United States court of appeals for the circuit in which the claimant or other party resides, or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia." 45 U.S.C. § 355(f).

The law is that " 'even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute.' " *City of Rochester v. Bond*, 603 F.2d 927, 935 (D.C. Cir. 1979) (footnote omitted). The special review statute vesting the Court of Appeals for the District of Columbia Circuit with jurisdiction over

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[1] 28 U.S.C. § 1631, in pertinent part, provides:

> Whenever . . . a petition for review of administrative action is noticed for or filed with . . . a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed. . . .

decisions made pursuant to the Act "cuts off" this Court's jurisdiction to review plaintiff's case.

Accordingly, it is, by the Court, this 12th day of July, 1990,

ORDERED that the above-captioned case shall be, and hereby is, transferred to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1631; and it is

FURTHER ORDERED that the above-captioned case stands dismissed from the dockets of this Court.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Nancy Johnson, Plaintiff, v. United States Retirement Railroad Board, Defendant.	Civil Action No. 89-2626

ORDER

(Filed Oct. 4, 1990)

On July 12, 1990, the Court issued an Order transferring the above-captioned case to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1631 because jurisdiction over the case properly lies in that Court and transfer would be in the interest of justice. Now before the Court is a motion by plaintiff requesting the Court to reconsider its transfer of her case to the Court of Appeals and instead to dismiss her case "outright" because she maintains that the transfer is not in the interest of justice in view of the procedural posture of her case. The defendant has no objection to dismissal of plaintiff's case.

Accordingly, it is, by the Court, this 4th day of October, 1990,

ORDERED that the plaintiff's motion requesting reconsideration of the Court's Order, filed on July 12, 1990, transferring the above-captioned case to the United States Court of Appeals for the District of Columbia Circuit shall be, and hereby is, granted; and it is

FURTHER ORDERED that the portion of the Court's Order, filed on July 12, 1990, transferring the above-captioned case to the United States Court of Appeals for the District of Columbia Circuit shall be, and hereby is, vacated; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) for the reasons set forth in the Court's July 12, 1990 Order; and it is

FURTHER ORDERED that the above-captioned case stands dismissed from the dockets of this Court.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES
DISTRICT JUDGE

CC: all counsel of record and clerk of U.S. Court of Appeals for D.C. Circuit.